

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between John Moore (“Moore”) and Evergreen Enterprises, Inc. (“Evergreen”), with Moore and Evergreen collectively referred to as the “Parties.” Moore is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Evergreen employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Moore alleges that Evergreen manufactures, distributes, sells, and/or offers for sale in the State of California beverage/wine chiller bags containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 health hazard warning. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as beverage/wine chiller bags containing DEHP including, but not limited to, the *Mango Moon Chilled Wine On-the-Go Reusable Chiller Bag, Item ID: Z3KA003 (#7 46851 56938 8)*, hereinafter referred to as the “Products.”

### 1.4 Notice of Violation

On or about April 25, 2012, Moore served Evergreen and various public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), alleging that Evergreen was in violation of Proposition 65 for failing to warn its customers and consumers in California that the Products exposed users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Evergreen denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, imported, distributed, and/or sold in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Evergreen of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Evergreen of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Evergreen. This section shall not, however, diminish or otherwise affect Evergreen's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean September 30, 2012.

## **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

### **2.1 Reformulation Standards and Commitment**

Commencing on the Effective Date and continuing thereafter, Evergreen shall only manufacture, distribute, ship, sell, or offer to ship for sale in California Products that are "Reformulated Products." For purposes of this Settlement Agreement, "Reformulated Products" shall mean Products that contain no more than 1,000 parts per million (0.1%) of DEHP when analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a solid substance.

### **2.2 Product Warnings**

Commencing on the Effective Date, Evergreen shall, for all Products other than Reformulated Products, provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b). Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an

ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

**(a) Retail Store Sales.**

**(i) Product Labeling.** Evergreen shall affix a warning to the packaging, labeling, or directly on each Product sold in retail outlets in California by Evergreen or any person selling the Products, that states:

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

**(ii) Point-of-Sale Warnings.** Alternatively, Evergreen may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products. Such instruction sent to Evergreen's customers shall be sent by certified mail, return receipt requested.

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:<sup>1</sup>

**WARNING:** The following products contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm:

*[list products for which warning is required]*

**(b) Mail Order Catalog and Internet Sales.** In the event that Evergreen sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, Evergreen shall provide warnings for

---

<sup>1</sup> For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

**(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Evergreen may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the designated symbol appears, Evergreen must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

**(ii) Internet Website Warning.** A warning shall be given in conjunction with the sale of the Products via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following

the display, description, or price of the Product for which it is given in the same type size or larger than the Product description text:

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

**WARNING:** Products identified on this page with the following symbol ▼ contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

### 3. **MONETARY PAYMENTS**

#### 3.1 **Initial Civil Penalty Pursuant to Health & Safety Code § 25249.7(b)**

Evergreen shall pay an initial civil penalty of \$5,000, to be apportioned in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Moore. Evergreen shall issue two separate checks for the penalty payment: (a) one check made payable to The Chanler Group in Trust for OEHHA in the amount of \$3,750, representing 75% of the initial civil penalty; and (b) one check to "The Chanler Group in Trust for John Moore" in the amount of \$1,250, representing 25% of the initial civil penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) John Moore, whose information shall be provided five calendar days before the payment is due. The payments shall be delivered on or before the Effective Date, to the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

### **3.2 Final Civil Penalty**

Evergreen shall pay a final civil penalty in the amount of \$10,000 on February 28, 2013. As incentive for Evergreen to reformulate the Products, however, this final civil penalty shall be waived in its entirety if an officer of Evergreen certifies in writing that it, as of February 15, 2013, will sell, ship and offer for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before February 28, 2013. The final civil penalty payment shall be apportioned in accordance with California Health & Safety Code §§ 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to John Moore. Evergreen shall issue two separate checks for the final civil penalty payment: (a) one check made payable to “The Chanler Group in Trust For OEHHA” in the amount of \$7,500, representing 75% of the total final penalty; and (b) one check to “The Chanler Group in Trust for John Moore” in the amount of \$2,500, representing 25% of the total final penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) John Moore, whose information shall be provided five calendar days before the payment is due (if different than the information already provided to Evergreen under Section 3.1 above).

Payment shall be delivered to Moore’s counsel at the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

### **3.3 Reimbursement of Fees and Costs**

The Parties reached an accord on the compensation due to Moore and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure § 1021.5 for all work performed in this matter. Under these legal principles, Evergreen shall pay \$22,000 for all fees and costs incurred investigating, bringing this matter to the attention of Evergreen, and negotiating a settlement in the public interest. Evergreen shall provide its payment in the form of a check payable to “The Chanler Group,” issue a separate

1099 for fees and costs (EIN: 94-3171522), and deliver payment on or before the Effective Date at the Payment Address provided in Section 3.1.

#### **4. RELEASES**

##### **4.1 Moore's Release of Evergreen**

This Settlement Agreement is a full, final and binding resolution between Moore and Evergreen, of any violation of Proposition 65 that was or could have been asserted by Moore on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against Evergreen, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Evergreen directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Releasees"), based on their failure to warn about alleged exposures to DEHP contained in the Products that were manufactured, distributed, sold, and/or offered for sale by Evergreen in California before the Effective Date.

In further consideration of the promises and agreements herein contained, Moore on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all Moore's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that Moore may have, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses -- including, but not limited to, investigation fees, expert fees, and attorneys' fees, but exclusive of fees and costs on appeal -- limited to and arising under Proposition 65 with respect to DEHP in the Products manufactured, distributed, sold and/or offered for sale by Evergreen before the Effective Date, against Evergreen and Releasees.

##### **4.2 Evergreen's Release of Moore**

Evergreen on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Moore and his attorneys.

and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Moore and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

**5. POST-EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement, Evergreen may send Moore a written request to draft and file a complaint, to incorporate the terms of this Settlement Agreement into a proposed consent judgment that provides a release in the public interest for the released Products, and to seek court approval of the consent judgment pursuant to Health & Safety Code § 25249.7, or as may be otherwise allowed by law. If so requested, Moore and Evergreen agree to reasonably cooperate, and to use their best efforts and that of their counsel to support the entry of the terms of this Settlement Agreement as a consent judgment by a superior court in California in a timely manner.

If so requested by Evergreen in writing, pursuant to Code of Civil Procedure §§ 1021 and 1021.5, then Evergreen will reimburse Moore and his counsel for their reasonable fees and costs incurred drafting and filing the complaint, converting this Settlement Agreement into a proposed consent judgment, and seeking judicial approval of the settlement in an amount not to exceed \$16,000, exclusive fees and costs incurred on appeal, if any. Evergreen shall remit payment to The Chanler Group at the payment address provided in section 3.1 within five business days of receiving a monthly invoice from Moore's counsel for work performed under this section.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision is held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California.



**8. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return receipt requested; or (iii) overnight courier on any party by the other party at the following addresses:

To Evergreen:

Clinton J. McCord  
Edwards Wildman Palmer LLP  
9665 Wilshire Boulevard, Suite 200  
Beverly Hills, CA 90212

To Moore:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

With a copy to:

Ting Xu, President  
Evergreen Enterprises, Inc.  
5915 Midlothian Turnpike  
Richmond, VA 23225

Any party may, from time to time, specify in writing to the other party a change of address to which all notices and other communications shall be sent.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (“pdf”) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. POST-EXECUTION ACTIVITIES**

Moore agrees to comply with the reporting form requirements referenced in Health & Safety Code § 25249.7, subdivision (f).

**11. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: SEPTEMBER 12, 2012

Date: \_\_\_\_\_

By:   
John Moore

By: \_\_\_\_\_  
Ting Xu, President  
Evergreen Enterprises, Inc.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

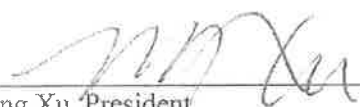
**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_  
John Moore

By:  \_\_\_\_\_  
Ting Xu, President  
Evergreen Enterprises, Inc.